



# Veterans Affairs: “Gray Area Retirees” — Issues and Related Legislation

**Douglas Reid Weimer**  
Legislative Attorney

June 21, 2010

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

R40815

# Report Documentation Page

Form Approved  
OMB No. 0704-0188

Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

1. REPORT DATE <b>21 JUN 2010</b>		2. REPORT TYPE		3. DATES COVERED <b>00-00-2010 to 00-00-2010</b>	
4. TITLE AND SUBTITLE <b>Veterans Affairs: ?Gray Area Retirees?? Issues and Related Legislation</b>				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) <b>Congressional Research Service, Library of Congress, 101 Independence Ave., SE, Washington, DC, 20540-7500</b>				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT <b>Approved for public release; distribution unlimited</b>					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES	19a. NAME OF RESPONSIBLE PERSON
a. REPORT <b>unclassified</b>	b. ABSTRACT <b>unclassified</b>	c. THIS PAGE <b>unclassified</b>			

## Summary

The United States Department of Veterans Affairs (VA) provides a broad range of benefits and services to American veterans and to certain members of their families. In addition, the Department of Defense (DOD) offers a variety of benefits to veterans who are also military retirees. When members of the National Guard or the Reserve who have not yet reached age 60 retire (usually after at least 20 years of service), however, they are not entitled to certain federal benefits, including health care. These military retirees are commonly known as "Gray Area Retirees" (GARs). These persons may not necessarily meet the relevant statutory definition of "veterans" for VA benefit purposes, nor are they eligible for DOD health benefits until they are eligible for military retired pay at age 60.

In order to be eligible for most VA benefits, the claimant must be a veteran, or in some cases, the survivor or dependent of a veteran. However, not every person who has served in the military is considered to be a "veteran" for the purposes of VA benefits. The concept of "veteran" is defined by federal statute and includes various criteria, such as discharge status, "active" service, time of service, and length of duty.

Based upon their military service and the eligibility criteria, it may be difficult for members of the National Guard and members of the various Reserve Components to qualify as "veterans" for purposes of VA benefits. Therefore, not every member of the Guard or the Reserve will be considered a "veteran" for the purposes of VA benefits.

Congressional interest has focused on this group of military retirees, and several bills were introduced in the first session of the 111<sup>th</sup> Congress which would provide certain benefits to this particular group of military retirees. Section 705 of the National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84) provides TRICARE Standard coverage (for purchase) for certain members of the Retired Reserve who are qualified for a non-regular retirement, but are not yet age 60 (GARs). Implementation of this program is in progress, and it is expected to be operational in the fall of 2010.

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## Introduction

The United States Department of Veterans Affairs (VA) provides a broad range of benefits and services to American veterans and to certain members of their families. In addition, the Department of Defense (DOD) offers a variety of benefits to veterans who are also military retirees. Retired members of the National Guard or the Reserve Components who have not yet reached age 60 (and who have not been recently deployed to a combat theater),<sup>1</sup> however, are not entitled to the same federal benefits, such as health care, that other veterans and military retirees receive.<sup>2</sup> These military retirees are commonly known as “Gray Area Retirees” (GARs). These persons may not necessarily meet the relevant statutory definition of “veterans” for VA benefit purposes,<sup>3</sup> nor are retired members of the National Guard or Reserve eligible for DOD benefits until they reach age 60.<sup>4</sup> Congressional interest has focused on the GARs, and bills have been introduced in the 111<sup>th</sup> Congress, which, if enacted, would align certain benefits for this particular group of retirees with benefits offered to other military retirees.

This report examines the current VA and DOD benefit eligibility for members of the National Guard and the Reserves. It also examines the benefit status and situation of GARs. Recently enacted legislation, the National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84), provides TRICARE Standard coverage for GARs and certain family members. This legislation is examined below in the section titled “Congressional Interest and Enacted Legislation.”

## Benefits Provided by the VA and the DOD

Various benefits are provided by the VA to “veterans,” and other benefits are provided by the DOD to certain military retirees. These two benefit systems are examined below.

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<sup>1</sup> The National Defense Authorization Act for Fiscal Year 2008 (NDAA, P.L. 110-181) was signed by President George W. Bush on January 28, 2008. The NDAA extends the period of enhanced enrollment opportunity for health care eligibility provided to veterans who served in a theater of combat operations after November 11, 1989 (commonly referred to as combat veterans or OEF/OIF veterans), as follows:

Combat veterans who were discharged or released from active service on or after January 28, 2003, are now eligible to enroll in the VA health care system for five years from the date of discharge or release. This means that combat veterans who were originally enrolled based on their combat service, but later moved to a lower Priority Group (due to the law’s former two-year limitation) are to be placed back in the priority for combat veterans for five years, beginning on the date of their discharge or release from active service.

Note: the five-year enrollment period applicable to these veterans begins on the discharge or separation date of the service member from active duty military service, or in the case of multiple call-ups, the most recent discharge date.

Combat veterans who were discharged from active duty before January 28, 2003, but did not enroll in VA health care now have three years to enroll and receive care as combat veterans. This three-year period of enhanced eligibility began on January 28, 2008, and expires on January 27, 2011.

<sup>2</sup> For example, a member of the Guard or the Reserves could retire at age 41 with 20 years of service. However, the retiree would not be eligible for certain federal benefits (e.g., health care and retirement pay) until 18 years later, when the retiree reaches age 60. This 18-year period is usually considered to be the “Gray Area.”

<sup>3</sup> Title 38 of the U.S. Code provides the statutory criteria for the definition of “veteran” and the subsequent eligibility for VA benefits.

<sup>4</sup> Under §§ 1074, 1076, and 1223 of Title 10 of the U.S. Code, members of the retired service are eligible for TRICARE Standard upon acquiring eligibility for retired pay at age 60.

## VA Benefits

Among the benefits extended to veterans through the VA are health care and related services, such as nursing homes, clinics, and medical centers; education, vocational training, and related career assistance; home financing; life insurance; burial benefits; benefits for certain family survivors; and financial benefits, including disability compensation and pensions.

In order to be eligible for most VA benefits, the claimant must be a veteran, or, in some cases, the survivor or the dependent of a veteran. Significantly, however, not every person who has served in the military is considered to be a “veteran” for the purposes of VA benefits. By federal statute, for VA benefit purposes, a “veteran” is defined as a “person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.”<sup>5</sup> Various criteria—including discharge status, “active” service, time of service (whether during “time of war”), and length of duty are all factors considered in determining whether a former service member is a “veteran” for the purposes of VA benefits.<sup>6</sup> Two particular elements of these criteria—“active duty” and “length of service”—are often difficult for members of the Guard and the Reserves to meet. As a result, these service members, having not met the statutory threshold criteria for “veteran,” are often not eligible for VA benefits.<sup>7</sup>

### The “Active Duty” Requirement

In many cases, members of the Guard and the Reserves may not have fulfilled the “active duty” requirement. Members of the Guard and Reserves who served on regular active duty are eligible for the same VA benefits as other veterans.<sup>8</sup> An example of this situation would be a Guard member who was called up to serve in the Persian Gulf for 12 months, and would thus be considered to have served on active duty for that period of time. Otherwise, Guard and Reserve duty is not considered “active duty” for benefits unless the service member performing this duty was disabled or died from a disease or injury incurred or aggravated in the line of duty.<sup>9</sup>

### The “Length of Service” Requirement

Guard and Reserve members must ordinarily serve a minimum of 24 continuous months on active duty to meet the “length of service” requirement in order to qualify for VA benefits. A former

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<sup>5</sup> 28 U.S.C. § 101(2); 38 C.F.R. § 3.1(d). For a thorough explanation of the statutory criteria for eligibility, see CRS Report RL33113, *Veterans Affairs: Basic Eligibility for Disability Benefit Programs*, by Douglas Reid Weimer. Title 5 of the U.S. Code provides the criteria for assistance and preferences in securing federal employment for veterans (5 U.S.C. § 2108). It should be observed that different criteria are used in these statutes (and for different purposes), and the determination of “veteran” status in Title 5 for employment preference does not determine “veteran” status for VA benefits under Title 38, and vice-versa. See CRS Report RS22666, *Veterans Benefits: Federal Employment Assistance*, by Christine Scott. In addition, state and local entities may have various (and differing) definitions and concepts of the term “veteran,” which may be utilized for employment preferences and other purposes.

<sup>6</sup> For more information, see CRS Report RL33113, *Veterans Affairs: Basic Eligibility for Disability Benefit Programs*, by Douglas Reid Weimer, pp. 2-7. Because each retiree’s military service, records, and categorization may be different, the retiree may not fit within the statutory categorization of “veteran.”

<sup>7</sup> However, they may be eligible for certain DOD-provided benefits, such as commissary privileges.

<sup>8</sup> 38 U.S.C. § 101(21)(A); 38 C.F.R. § 3.6(b)(1).

<sup>9</sup> 38 U.S.C. § 101(21)(A); 38 C.F.R. § 3.6(a). Inactive duty would include duty other than full-time duty, such as weekend assignments or part-time details.

Guard or Reserve member who has served for less than 24 months of continuous active duty may still qualify so long as the service member has served the “full period” for which he or she was “called to duty.” This requirement was fulfilled, for example, by Guard and Reserve members who were called to active duty during the 1991 Persian Gulf War. These service members satisfied the minimum length of service requirement, even though most did not serve for a full 24 months. But their orders reflected that they served the full period for which they were called to active duty.<sup>10</sup>

### **VA Determination on a Case-by-Case Basis**

Although many Guard and Reserve members may not appear to be eligible “veterans” for the purposes of VA benefits, certain exceptions and special circumstances may exist, which add to the complexity of the eligibility determination. As each service member’s military service may be different, and therefore may fit within certain case categories or exceptions, eligibility may usually be determined by the VA, on a case-by-case basis, after reviewing the individual service member’s military service records.

### **DOD Retiree Health Benefits**

As with the VA’s system, the DOD’s military health system includes a health benefits program, generally referred to as “Tricare.” Tricare serves active duty service members; National Guard and Reserve members; retirees; and their families, survivors, and certain former spouses, worldwide. As a major component of the Military Health System, Tricare brings together the health care resources of the uniformed services and supplements them with networks of civilian health care professionals, institutions, pharmacies, and suppliers to provide access to health care services while maintaining the capacity to support military operations.<sup>11</sup>

Prior to the enactment of the recently enacted legislation, discussed below, GARs were usually not eligible for Tricare health benefits until they became eligible for retired pay at age 60 (at which time, they are no longer considered GARs). However, these individuals and eligible family members may purchase the TRICARE Retiree Dental Program (TRDP) before drawing retirement pay. Individuals who enroll in TRDP within 120 days of their official retirement date are not subject to a 12-month waiting period, which is otherwise required for certain TRDP benefits.

Members of the retired reserve who are receiving retired pay, but are not yet eligible for Medicare (generally those retirees between ages 60 and 64), are automatically eligible for TRICARE Standard or TRICARE Extra. They may also enroll in TRICARE Prime if they live in an area where it is offered.

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<sup>10</sup> This was confirmed by VA Gen. Coun. Memorandum (March 14, 1991) (Activation of Reservists of Operation Desert Shield/Storm).

<sup>11</sup> A person who is properly registered in the Defense Enrollment Eligibility Reporting System (DEERS) is automatically covered by TRICARE Standard. Eligible beneficiaries do not need to enroll for Standard coverage, nor take any other action; individuals who are otherwise eligible for Tricare health care coverage are automatically covered under TRICARE Standard. For additional information about the military health system, see CRS Report RL33537, *Military Medical Care: Questions and Answers*, by Don J. Jansen.

Upon attaining age 65, reservists receiving retired pay must enroll in Medicare Part B in order to retain Tricare coverage. TRICARE for Life (TFL) is for all Tricare beneficiaries who are entitled to Medicare Part A and who have Medicare Part B coverage based on age. There are no enrollment fees for TFL, and the catastrophic cap is \$3,000 per fiscal year per family. TRDP also remains available.

## **Gray Area Retirees ("GARs")**

Eligibility for VA benefits may vary significantly for certain members of the Guard and the Reserves, as compared to members of the regular military, particularly at the time that a member of the Guard or Reserves retires.

### **The National Guard and the Reserves—Background and Purpose**

The Guard had its antecedents in the colonial militias, with the concept of the "citizen-soldier," who was called to service during times of need. Today the Guard serves a two-fold function—it provides security and assistance on the home front and is also available for military missions abroad. For example, the Guard was deployed in the wake of Hurricane Katrina in 2005, and many members of the Guard have served or are serving in Iraq and Afghanistan.<sup>12</sup>

The Reserves of the United States Armed Forces are military organizations—such as the Army Reserve or the Navy Reserve—whose members usually perform a minimum number of military duty days per year and whose members may be "called up" for duty as required. The Reserves augment the active duty (full-time) military when their services are needed. These entities are known collectively as "the Reserves," the "Reserve Units," or the "Reserve Components."<sup>13</sup>

### **Career Pattern**

Ordinarily, a member of the Guard or the Reserves may retire after 20 years of service with his/her unit. Certain federal benefits for the retired member (which include health care and retirement pay) currently do not commence until the retiree reaches age 60. Depending upon the retiree's age and length of service, the retiree could be as young as age 37, but will not receive the federal retirement benefits until reaching age 60. This time period from retirement to age 60 is generally referred to as the "Gray Area," and this category of retirees is generally referred to as "Gray Area Retirees." This term is not defined by statute or regulations, but generally refers to members of the Guard or Reserves who have transferred to the Retired Reserve after 20 years (or more) of service with their unit, but who have not reached age 60.

Most members of the Guard or the Reserves who elect to remain in service will have served between 20 and 30 years. Upon retirement, the service member will transfer from the Active Reserve service to the Retired Reserve. The service member is still subject to "call up" to active

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<sup>12</sup> The Guard's website provides background and organizational information: <http://www.ng.mil/default.aspx>.

<sup>13</sup> The website of the Office of the Assistant Secretary of Defense for Reserve Affairs contains organizational and related information: <http://www.defenselink.mil/ra/>. Certain parts of the National Guard of the United States—the Army National Guard of the United States and the Air National Guard of the United States—are considered part of the Reserves.

duty. At age 60, the GAR is then usually entitled to DOD benefits similar to those of service members who retire from active military service after at least 20 years. However, in many cases, the GARs are not considered to be veterans under Title 38 for VA benefit purposes. A GAR carries a Military ID card marked "Ret," maintains military base privileges, and usually keeps the commissary privileges that he/she had while on active reserve status. GARs are eligible for (1) VA disability compensation and VA health care for disabilities or injuries occurring while performing inactive duty for training, regardless of length of service; (2) VA home loan eligibility, as long as the retiree had six or more years of honorable service in the Selected Reserve; (3) VA burial and memorial benefits if the retiree is entitled to reserve retired pay at the time of his/her death; and (4) conversion of Servicemen's Group Life Insurance (SGLI) to Veterans Group Life Insurance (VGLI). Basically, before age 60, the retired reservist has the same benefits that he/she had before retirement, but without receiving pay.<sup>14</sup> When the retiree reaches age 60, retirement pay and medical benefits begin. But, if the GAR is called back to active service, the GAR will regain eligibility for pay, medical benefits, and other service benefits during this period of active service. Generally speaking, a retired reservist at age 60 will receive DOD benefits and privileges comparable to those of a "regular" military retiree, including retirement pay and medical benefits.

## **Spousal Survivor Benefits**

GARs' surviving spouses are eligible for their annuities.<sup>15</sup> P.L. 106-65, § 656, (October 5, 1999), provides the authority for granting an annuity to certain surviving spouses of service members who did not decline participation in the Survivor Benefit Plan. This legislation provides coverage to surviving spouses of all GARs.

## **Congressional Interest and Enacted Legislation**

Congressional interest has focused on the benefit status of GARs, and legislation has been enacted to extend health care to these retired service members and certain family members. Section 705 of the National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84) (October 28, 2009) provides TRICARE Standard (TS) coverage<sup>16</sup> for certain members of the Retired Reserve who are qualified for a non-regular retirement but are not yet age 60. Once the program is implemented by the TRICARE Management Activity (TMA), all GARs who were previously only eligible to receive Reserve retirement pay and TS at age 60 will be able to *purchase* TS individual or family coverage at a premium equal to the full cost of coverage to the DOD. These cost figures are to be determined by the Secretary of Defense on an actuarial basis.<sup>17</sup>

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<sup>14</sup> For a complete comparison between the benefits offered to a GAR and to a retiree age 60 or over receiving retired pay, see <http://www.ng.mil/news/archives/2009/03/Benefits.pdf>.

<sup>15</sup> This situation occurs when a GAR dies before receiving retirement pay. However, his/her surviving spouse is eligible for this annuity/retirement benefit.

<sup>16</sup> For an overview of TRICARE Standard, see <http://www.military.com/benefits/tricare/tricare-standard/tricare-standard-overview>.

<sup>17</sup> See CRS Report R40711, *FY2010 National Defense Authorization Act: Selected Military Personnel Policy Issues*, coordinated by Don J. Jansen, p. 8.

In order for the TMA to implement the TS program for GARs, it must process the technical, legal, and administrative tasks involved with bringing a new program into operation. TMA is currently drafting regulations for the implementation of the TS for GARs. It is anticipated that regulations may be ready in September 2010. At this time, there is no exact implementation date scheduled.<sup>18</sup>

Prior to the enactment of the National Defense Authorization Act for Fiscal Year 2010, the 111<sup>th</sup> Congress had considered several other pieces of legislation, which included H.R. 270<sup>19</sup> (the TRICARE Continuity of Coverage for National Guard and Reserve Families Act of 2009); H.R. 972<sup>20</sup> (a bill to eliminate the requirement that certain former members of the Reserve Components of the Armed Forces be at least 60 years of age in order to be eligible to receive health care benefits); S. 731<sup>21</sup> (the companion bill to H.R. 270); and S. 1390<sup>22</sup> (the National Defense Authorization Act for Fiscal Year 2010), which contains provisions similar to those which were enacted.

## Conclusion

With public and congressional interest focused on veterans' issues and benefits, consideration is being given to the benefits extended (and not extended) to members of the Guard and the Reserve. Particular interest has focused on the status of GARs and the situation that they encounter—especially in regard to health care benefits—if they retire before age 60. In response to these concerns, legislation was enacted in the first session of the 111<sup>th</sup> Congress to enable GARs to purchase TRICARE Standard for themselves and for certain members of their families. Plans for implementation of the program are currently under way. It is anticipated that the program may be operational by the fall of 2010, but no definite date has been announced.

## Author Contact Information

Douglas Reid Weimer  
Legislative Attorney  
dweimer@crs.loc.gov, 7-7574

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<sup>18</sup> Status information obtained from TMA (Allen Edwards, CIV, OASD(HA)/TMA) (June 3, 2010).

<sup>19</sup> Introduced on January 7, 2009, and referred to the House Committee on Armed Services on that date. On January 30, 2009, the bill was referred to the House Subcommittee on Military Personnel.

<sup>20</sup> Introduced on February 20, 2009, and referred to the House Committee on Armed Services on that date. On March 13, 2009, the bill was referred to the House Subcommittee on Military Personnel.

<sup>21</sup> Introduced on March 26, 2009, and referred to the Senate Committee on Armed Services on that date.

<sup>22</sup> Introduced on July 2, 2009, and passed by the Senate with the amendment on July 23, 2009. On July 28, 2009, the bill was held at the desk.